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NO.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

ACME REFRIGERATION OF BATON ROUGE, INC.,
Petitioner

versus

WHIRLPOOL CORPORATION & HEIL QUAKER CORPORATION
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether or not a parent corporation and its wholly-owned subsidiary constitute a single economic unit as a matter of law so as to be the same seller in a price discrimination action for violation of section 2 of the Clayton Act of 1914, as amended by the Robinson-Patman Act, 15 U.S.C. §13?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No.

ACME REFRIGERATION OF BATON ROUGE, INC.*
Petitioner

VERSUS

WHIRLPOOL CORPORATION & HEIL QUAKER CORPORATION
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Fifth Circuit Court of Appeals reversing the District Court's judgment based on a jury verdict in favor of Petitioner appears as Appendix A to this petition, and is reported at 785 F.2d 1240. The Per Curiam opinion of the Fifth Circuit denying a petition for rehearing and suggestion for rehearing en banc appears as Appendix B to this petition. The opinion of the District

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* Petitioner has no parent companies, subsidiaries (other than wholly-owned subsidiaries) or affiliates.

Court denying Summary Judgment is not reported but is attached as Appendix C. The District Court's memorandum order on pre-trial motions appears as Appendix D. The District Court's post-trial written reasons and order appears as Appendix E. The judgment of the District court appears as Appendix F.

JURISDICTION

The judgment of the United States Fifth Circuit Court of Appeals was filed on March 28, 1986. The application for a rehearing and suggestion for rehearing en banc were both timely filed on April 9, 1986. The application for rehearing was denied on April 28, 1986. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1).

PERTINENT STATUTORY PROVISIONS

15 U.S.C. Section 13(a)

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular posession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person

who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them:
. . ."

15 U.S.C. Section 15(a)

"Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damage by him sustained, and the cost of suit, including a reasonable attorney's fee.
. . ."

STATEMENT OF THE CASE

This complaint seeking damages against defendants Whirlpool Corporation and its wholly-owned subsidiary Heil Quaker Corporation for alleged price discrimination in violation of the Robinson-Patman Act was filed in the United States District Court for the Western District of Louisiana. Jurisdiction was alleged on the basis of 28 U.S.C. 1337 and under the provisions of 15 U.S.C. Sections 13 and 15.

For plaintiff (petitioner herein) to prevail, defendant Whirlpool Corporation and its wholly-owned subsidiary Heil Quaker Corporation must be considered to constitute one "economic unit" as the "same seller" since the discriminatory sales were made to plaintiff by Whirlpool

and to plaintiff's competitor by Heil Quaker.

Defendants filed a Motion for Summary Judgment contending that as a matter of fact the parent did not control the subsidiary and that they were not a single economic unit so as to be the "same seller" under the Robinson-Patman Act. Plaintiff opposed this Motion contending that based on the decision of the Fifth Circuit in *Security Tire and Rubber Company v. Gates Rubber Company*, 598 F.2d 962 (1979) cert. den 444 U.S. 942 (1980), the prior "factual control" test for the "single economic entity" doctrine had been reversed and that as a matter of law, a parent and its wholly-owned subsidiary were one "economic entity" and the "same seller". Alternatively, plaintiff contended that there were disputed factual issues to be determined on trial as to "control". On July 27, 1983, the lower Court rendered a written opinion denying the Motion for Summary Judgment. (Appendix C).

Thereafter, on June 19, 1984, this Court rendered its decision in the case of *Copperweld Corporation v. Independence Tube Corporation*, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). After this decision and prior to trial, plaintiff filed a Motion *in limine* to strike the defense that defendants were not a single "economic entity" and the "same seller". Prior to trial, the District Court granted plaintiff's Motion (Appendix D, paragraph 5) and granted plaintiff's request to instruct the jury that Whirlpool and Heil Quaker were the "same seller".

The jury rendered a verdict in favor of plaintiff. Post-trial Motions by defendants were denied. Judgment was entered in keeping with the jury verdict. (Appendix F.).

The judgment of the Lower Court was reversed by the Fifth Circuit Court of Appeals for reasons set forth in the opinion filed on March 28, 1986. (Appendix A). Rehearing was denied on April 28, 1986 in a Per Curiam opinion. (Appendix B). In neither opinion did the Fifth Circuit refer to the opinion of this Court in *Copperweld*, although in all briefs the Court's attention had been specifically directed to that decision.

REASONS FOR GRANTING THE WRIT

In *Copperweld Corporation v. Independence Tube Corporation*, supra, this Court held as a *matter of law* that a parent corporation and its wholly-owned subsidiary constituted a single economic unit for purposes of Section 1 of the Sherman Act. We can only assume, from the lack of discussion of *Copperweld's* applicability to the "single enterprise" issue, that the Court below concluded your decision was limited to the Sherman Act conspiracy doctrine.

The Sixth Circuit has taken a contrary view. In *Russ' Kwik Car Wash v. Marathon Petroleum Company*, 772 F.2d 214 (6th Cir. 1985), that Court in a Robinson-Patman Act case overruled a previous line of "factual control" cases on the "single entity" doctrine, relying on this Court's decision in *Copperweld*.

The Sixth Circuit, after recognizing that although *Copperweld* dealt with combinations or conspiracies between a parent corporation and its subsidiary, nonetheless pointed out that this Court had stated without qualification that a subsidiary acts for the benefit of the parent. The Court further quoted from footnote 18 of *Copperweld*,

supra, pages 2742-2743, where this Court had discussed the various criteria for the "single entity" factual control test and noted this Court's observation that those factors could not overcome the legal conclusion that a parent and its wholly-owned subsidiary were a single economic unit. The Sixth Circuit then reversed an earlier line of factual control cases and held as a matter of law that a parent and its subsidiary "are a single economic unit". *Russ Kwik,* supra, 221.

The factual context in which *Russ Kwik* arose involved the "same purchaser" doctrine, as did the Fifth Circuit's decision in *Security Tire and Rubber Company v. Gates Rubber Company,* 598 F.2d 962 (1979), cert. denied 444 U.S. 942 (1980). In *Security Tire,* the Court held as a *matter of law,* not fact, that a parent corporation and its wholly-owned subsidiary constituted a single economic unit and therefore transfers between them did not constitute sales as there was only one purchaser. In reversing the Lower Court in the instant case, the Appellate Court held that the Trial Judge misconstrued the opinion of the panel that decided *Security Tire* by applying the corollary of the "same purchaser" rule in the factual context of the "same seller" rule.

A review of the Trial Judge's written ruling denying the Motion for Summary Judgment (Appendix C) indicates that the Fifth Circuit misconstrued the reasons given by the Lower Court in denying the Motion for Summary Judgment at the time the opinion was given. It is true the Trial COurt did indicate that possibly the corollary of *Security Tire* and the "same purchaser doctrine would apply to a parent and its subsidiary as the "same seller". However, the denial at that time was based on questions of fact involved. It was only after *Copperweld* was decided by this

Court that the Trial Judge granted plaintiff's Motion *in limine* and held that as a matter of law a parent and its wholly-owned subsidiary constituted one economic unit and therefore they were the "same seller".

Even prior to *Copperweld*, a Trial Judge in the Southern District of Mississippi noted in *Uniroyal, Inc. v. Hoth & Thames, Inc.*, 511 F.Supp. 1060 (S.D. Miss. 1981) that the parties had agreed that as a corollary of *Security Tire* the doctrine should be applied to the "same seller" in a Robinson-Patman price discrimination suit. This decision was cited with approval in another panel decision of the Fifth Circuit Court in *Eximco, Inc., v. Trane Company*, 737 F.2d 505 (5th Cir. 1984) in reiterating approval of *Security Tire*.

In the opinion below, the Court observed that for years the Courts have wrestled with the problem of determining how affiliated corporations fit into the scheme of price discrimination anti-trust litigation. Such litigation would be avoided by uniformity in the application of anti-trust legal principles.

Examination of this case and the citations referred to herein illustrates this lack of uniformity in dealing with the "single entity" doctrine between a parent corporation and its wholly-owned subsidiary. We have these holdings:

1. A corporation and its wholly-owned subsidiary are a "single economic unit" as a matter of law and the "same seller" under Robinson-Patman (Trial Judge's instruction to the jury in this case).

2. Acorporation and its wholly-owned subsidiary are a "single economic unit" as a matter of law" under the "same purchaser" doctrine under Robinson-Patman (*Security Tire*, supra).

3. A corporation and its wholly-owned subsidiary as seller are separate economic units and there must be a factual "affirmative showing" of "control" under the Robinson-Patman "same seller" doctrine. (Court of Appeal decision in the instant case).

4. A corporation and its wholly-owned subsidiary are a single economic unit as a matter of law under Robinson-Patman for all purposes, (*Russ Kwik*, supra), under both the "same seller" and "same purchaser" doctrine since the Sixth Circuit relied on *Copperweld* in overuling the criteria control test.

5. A parent and its wholly-owned subsidiary are the same economic unit as a matter of law under Section 1 of the Sherman Act (*Copperweld*, supra).

CONCLUSION

To borrow the words of the Fifth Circuit, there should be an end to the "wrestling" by the Courts with the problem of determining how affiliated corporations fit into the scheme of anti-trust laws.

Uniformity in the application of the anti-trust laws in this area can be achieved only if a corporation and its wholly-owned subsidiary, as a matter of law, are considered as constituting a single economic unit as a seller and as a purchaser.

We respectfully suggest that that this petition for a writ of certiorari should be granted so that this Court may establish such uniformity.

Respectfully submitted:

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PROOF OF SERVICE

I, Roger M. Fritchie, attorney for Acme Refrigeration of Baton Rouge, Inc. petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 9th day of July 1986, I served the foregoing petition for a writ of certiorari, and its appendices, on Whirlpool Corporation and Heil Quaker Corporation, respondents in connection with this application for a writ of certiorari by mailing three copies thereof to its counsel of record, Michael R. Turnoff, 7500 Sears Tower, Chicago, IL., 60606, and to Timothy J. McNamara, 102 Versailles Blvd., Lafayette, LA, 70501.

ROGER M. FRITCHIE

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ACME REFRIGERATION
of BATON ROUGE, INC.,
Plaintiff-Appellee,

v.

WHIRLPOOL CORPORATION &
HEIL-QUAKER
CORPORATION,
Defendants-Appellants

NO. 85-4043
OPINION

Filed March 28, 1986

Before: John R. Brown, Thomas M. Reavley and Robert M. Hill, Circuit Judges.

Opinion by Judge Thomas M. Reavley

Appeal from the United States District Court
for the Western District of Louisiana
John M. Shaw, District Judge, Presiding

OPINION

THOMAS M. REAVLEY, Circuit Judge:

Defendants Whirlpool Corporation and Heil-Quaker Corporation appeal the district court's judgment in favor of plaintiff Acme Refrigeration of Baton Rouge, Incorporated (Acme). We reverse.

FACTS

This litigation focuses on the sale of "Whirlpool" brand heating and air conditioning equipment in a thirteen-parish area located in southwest Louisiana (the "trade area"). The equipment is manufactured by Heil-Quaker, a Delaware corporation, at its plants in Tennessee. At the time of trial, Heil-Quaker marketed its products by contracting with 54 distributors.

Whirlpool, another Deleware corporation, is a major manufacturer of household appliances and other "white goods," and its thirteen sales divisions distribute these products nationwide, In addition, three of its sales divisions[1] sold heating and air conditioning equipment, contracting with Heil-Quaker as their supplier. One of these three divisions, the Houston, Texas sales division ("HSD"), sold this equipment well outside the geographic region specified in its agreement with Heil-Quaker, that region being the Houston metropolitan area. Besides selling this equipment to buyers located in other Texas cities, HSD contracted with two Louisiana distributors who serviced the trade area, Cooling and Heating, Incorporated (located in Lafayette) and Cooling & Heating of Lake Charles, Incorporated (collectively, "C & H").

On January 1, 1981, Acme purchased the assets of C & H. On March 2, HSD executed a Dealer Sales Agreement (the "Agreement") with Acme, supplying it with Whirlpool brand equipment for the remainder of the year. Although no written contract was executed for 1982, the Agreement

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[1] These sales divisions are located in Houston, Texas; Kansas City, Missouri; and Charlotte, North Carolina.

contained an automatic renewal clause, which provision was subsequently triggered by HSD's failure to give Acme timely notice of its decision not to renew their contract for 1982.[2]

By the end of 1981, Heil-Quaker, disappointed with its share of the Houston market, decided that HSD should concentrate all its efforts on the Houston area. Unaware of any formal agreements HSD had executed, Heil-Quaker directed HSD to sever its "associate distributorships" by June 30, 1982. Contemporaneously, Heil-Quaker sought a distributor which could service all of the major Louisiana markets, including those outside the trade area. On April 21, 1982, Heil-Quaker appointed Solar Supply Company, Incorporated (Solar) to be its exclusive distributor in Louisiana. Solar's entry into the market immediately ended Acme's monopoly in the trade area. Moreover, Acme found itself at a competitive disadvantage because Solar—buying directly from Heil-Quaker instead of from HSD—was able to lower its cost of supply and pass the savings on to its customers.

Acme stopped buying equipment from HSD in July of 1982 and brought this suit in the district court. In its amended complaint, Acme charged, *inter alia*,[3] (1) that Heil-Quaker, as a wholly -owned subsidiary of Whirlpool, is the "alter ego" of Whirlpool, (2) that Heil-Quaker's sales are therefor imputable to Whirlpool, (3) that Whirlpool

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[2] The Agreement called for HSD to notify Acme at least thirty days prior to the contract's expiration, December 31, 1981. It is undisputed that HSD failed to give such notice.

[3] The trial court dismissed Acme's claims based on Louisiana antitrust law and its claim based on § 1 of the Sherman Antitrust Act of 1890, 15 U.S.C. § 1 (1982).

discriminated in price between Acme and Solar[4] in violation of § 2 of the Clayton Act of 1914, as amended by the Robinson-Patman Act of 1936, 15 U.S.C. § 13 (1982) (the "Act"), (4) that its Agreement with HSD was breached because it was forced to stop making purchases under that contract, and (5) that HSD had made several fraudulent misrepresentations. The jury returned a verdict in favor of Acme on all its claims and awarded $252,612 in damages. The trial court, entering judgment against defendants Whirlpool and Heil-Quaker on the antitrust claim, trebled damages to $757,837.[5] This appeal followed the trial court's denial of defendants' motions for a judgment n.o.v. and for a new trial.

DISCUSSION

A. *Price Discrimination*

[1] In order to make a claim of price discrimination, a plaintiff must allege that a given commodity was sold to two different buyers at two different prices by the same seller. For years courts have wrestled with the problem of determining how affiliated corporations fit into this scheme. Whirlpool and its wholly-owned subsidiary, Heil-Quaker, are distinct legal entities. The district court, however, treated the two as one. Relying on *Security Tire & Rubber Co. v. Gates Rubber Co.*, 598 F.2d 962 (5th Cir. 1979, (*cert. denied*, 444 U.S. 942 (1980), the trial judge held that, as a matter of law, a parent corporation and its

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[4] The price charged Acme by Whirlpool's Houston sales division was higher than the price charged Solar by Heil-Quaker.

[5] The court's judgment as to Acme's contract and tort claims was conditioned upon the judgment it entered on the antitrust claim.

wholly-owned subsidiary constitute as single economic unit, and he instructed the jury to consider Whirlpool and Heil-Quaker as the same seller.[6] We conclude that the trial judge misinterpreted *Security Tire.*

In *Secuirity Tire,* a parent corporation and its wholly-owned subsidiary sold same commodity, the subsidiary selling only what was first transferred to it by the parent. The plaintiff, who bought from the parent, charged that the subsidiary received a lower price. A panel of this circuit held that, as a matter of law, transfers from a parent corporation to its wholly-owned subsidiary cannot be considered "sales" to a "favored" buyer. 598 F.2d at 967. Because the plaintiff did not allege that the parent favored any other buyer, the court could find no price discrimination.

[2] Although it attached no competitive significance to the price charged a subsidiary by its parent, the court emphasized that its holding was limited to situations where the subsidiary acted as buyer, not seller. Acknowledging that a subsidiary's own sales can form the basis for a claim of price discrimination, the court expressly left intact the "same seller" doctrine. *Id.* at 966. Under such a theory, a subsidiary's sales are imputed to its parent if the latter "actively controls" the former. *Id.* Therefore, if a parent and its "controlled" subsidiary charge different buyers different prices for the same commodity, they will have violated the Act. The same seller doctrine, however, is not to be invoked merely upon a showing that one seller

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[6] Previous to this instruction, the trial court, in denying the summary judgment motion of Whirlpool and Heil-Quaker, decided the "single entity" isue in favor of Acme. It subsequently granted Acme's motion *in limine* to exclude any evidence at trial bearing on the issue.

is wholly owned by another. Instead, there must be an "affirmative showing" that the parent actively controls its subsidiary. *Id. See.* III E. Kintner & J. Bauer, *Federal Antitrust Law* § 21.16, at 212 (1983); 4 J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 24.04[2][a](1985).

[3] In the absence of evidence that Whirlpool either actively controlled Heil-Quaker or the terms of the latter's sales, we must conclude that they are not the same seller. *See Hiram Walker, Inc. v. A & S Tropical, Inc.* 407 F.2d 4, 8 (5th Cir.), *cert.denied,* 396 U.S. 901 (1969); *Baim & Blank, Inc. v. Philco Corp.,* 148 F.Supp. 541, 543-44 (E.D.N.Y. 1957). In its amended complaint, Acme acknowledged that Whirlpool and Heil-Quaker were separate corporations; nevertheless, it alleged that Heil-Quaker was the "alter ego" of Whirlpool. Whirlpool and Heil-Quaker moved for summary judgment, arguing that no factual dispute existed concerning their corporate relationship, that the undisputed facts demonstrated that Whirlpool did not actively control Heil-Quaker, and that they could not otherwise be considered the same seller. Attached to their motion were various affidavits, including those of HSD's general manager and Heil-Quaker's vice-president of marketing. These officials stated that Heil-Quaker's president and chief executive officer was neither an officer nor a director of Whirlpool; that all of Heil-Quaker's distributors operated under year-long contracts which were approved—then later either renewed or terminated at the close of the year—solely by Heil-Quaker, a decision reached without any participation by Whirlpool; that Heil-Quaker had previously not renewed distributorship contracts with other Whirlpool sales divisions because of poor performance; that Heil-Quaker's prices, terms and conditions of sale were determined and established solely by its

personnel; and that HSD's prices, terms and conditions of sale were determined and established without consultation with Heil-Quaker.

[4] The extent of Acme's evidence in opposition was an affidavit of its accountant, who stated that Whirlpool prepared and filed its financial reports on a consolidated basis. Acme failed to raise an issue of material fact concerning Whirlpool's alleged control of Heil-Quaker; furthermore, Acme has never pleaded actual control and does now suggest that any other evidence exists in its favor bearing on the issue of control. We conclude that the uncontroverted facts establish that Whirlpool and Heil-Quaker are not the same seller. Moreover, Acme did not allege that Whirlpool and Heil—Quaker, considered separately, discriminated in price. Therefore, we hold that Acme failed to raise any issue of price discrimination. Defendants' motion for summary judgment should have been granted. Failing this, their motion for judgment n.o.v. should have been granted.

B. *Acme's State Claims*

Acme was forced to choose between holding firm on price, thereby losing sales to Solar, and slashing prices, thereby making its sales unprofitable. Moreover, shortly after its appointment in April of 1982, Solar began informing its customers that, 90 days hence, Acme would no longer be distributing Whirlpool products, Declining to add to its mounting inventory, Acme stopped buying equipment and brought this suit instead, charging that blame lay with Whirlpool.

1. *Breach of Contract*

[5] Acme's theory that its Agreement with HSD was breached is a confused one. On one hand, Acme identified the breach—and the court so instructed the jury—as Heil-Quaker's selection of Solar to be its exclusive distributor in Louisiana. On the other, Acme charged that its inability to continue making purchases under the Agreement constituted a breach thereof. Under either theory, we find no evidence whatsoever that HSD breached the Agreement. Therefore, the trial court erred by denying defendant's motion for a judgment n.o.v. *See Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969)(en banc).

[6] Heil-Quaker's appointment of Solar is of no consequence. By its own terms, the Agreement was non-exclusive.[7] Moreover, Solar became Heil-Quaker's distributor, not HSD's.[8] Finally, it was Acme's decision to stop buying equipment, and there is no evidence—nor does Acme allege—that HSD violated a specific provision of their Agreement or that HSD was unwilling to supply Acme for the balance of 1982. We conclude that no breach of contract is shown.

2 *Fraudulent Misrepresentation*

[7] Acme's fraud claim is based on statements

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[7] We consider below Acme's contention that HSD represented that Acme was to remain the exclusive Whirlpool distributor in the trade area.

[8] We note that Acme had a claim of interference with business relations lodged against Heil-Quaker. Such a claim, however, does not reach HSD. Upon Heil-Quaker's motion, the court dismissed Acme's claim prior to trial.

allegedly made by Tom Bowers, now deceased,[9] who, as one of HSD's three sales managers, headed its heating and cooling department. The alleged misrepresentations are that Bowers told Acme in January of 1982 that it would have an exclusive distributorship through 1982; that, in April of 1982, Bowers denied the fact of Solar's appointment; and that Bowers told Acme in May of 1982 that it would be charged the same prices that Heil-Quaker charged Solar. We conclude that the record will not support Acme's claim, and a judgment n.o.v. would have been proper. *See Boeing,* 411 F.2d at 374.

Our resolution of Acme's claim requires that we consider the interests of the various parties involved. Heil-Quaker's disenchantment with HSD had less to do with HSD's association with Acme than it did with HSD's failure to penetrate the Houston market. Bowers' reluctance to accommodate Heil-Quaker's request to terminate HSD's relationship with Acme had less to do with notions of a contractual obligation[10] than it did with the fact that Acme was a source of considerable business and profit to HSD. Finally, there is no evidence—and Acme does not allege—that Heil-Quaker could have or would have suspended its own sales to HSD if HSD refused to stop selling to Acme.

[8] Turning now to Bowers' first statement, Acme argues that Bowers knew since December of 1981 that

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[9] Bowers died the month after this suit was brought.

[10] HSD entered into many distributorship contracts, which numbered 233 in 1984. Charles Pitner, HSD's general manager, testified that HSD was able to sever its contracts with some of its other associate distributors because of a contractual provision allowing termination, upon 30 days' notice, if based upon dissatisfaction with performance.

Heil-Quaker wanted Acme phased out by June 30, 1982. We have already ruled that the HSD-Acme Agreement was not breached, and the evidence reveals that Bowers was steadfastly reluctant to terminate HSD's relationship with Acme. Moreover, there is no evidence that Bowers believed his negotiations with Heil-Quaker ever reached the point where the HSD-Acme Agreement was imperiled. In fact, at the time of the December meeting. Heil-Quaker itself considered selling directly to Acme. The evidence of Bowers' statement as to Acme's distributorship in 1982 does not support a fraud claim. As to the distributorship being exclusive, Acme's claim is defective in two respects. Heil-Quaker controlled the distribution of the products it manufactured. Because Bowers could not bind or otherwise make decisions for Heil-Quaker, it would have been unreasonable to rely on Bowers' promise that Acme's distributorship would remain exclusive. Furthermore, the trial court correctly instructed the jury that unfulfilled promises cannot form the basis for fraud. *See Gamble v. Carter,* 378 So.2d 185, 186 (La. App. 1979); *Swann v. Magouirk,* 157 So.2d 749, 751 (La. App. 1963).

[9] As to Bowers' denial of Solar's appointment, Acme relies upon the testimony of its equipment manager, Commodore Lloyd, who testified that he called Bowers twice, a week before and about a week after Solar's appointment on April 21, 1982, The evidence indicates that the extent of Bowers' knowledge, gained subsequent to Lloyd's first phone call, was merely that Solar was under consideration by Heil-Quaker for a distributorship. As to the second phone call, made nine days after Solar signed the contract and three days before Acme itself received formal notification. Acme's Lloyd testified only that Bowers said he "still didn't know anything." Acme's own exhibit, an inter-office

memorandum written by Bowers, reinforces the fact that Bowers was not privy to the corporate decisions of either Solar or Heil-Quaker. We conclude that the evidence does not support Acme's claim that Bowers' statements were false.

Finally, Bowers' statement regarding pricing was not a representation but was instead a promise to do something in the future, thereby not being actionable as fraud. Although an exception to the rule is made where it is proved that the promiser had no intention of fulfilling his promise, *see Gamble*, 378 So.2d at 186, there is no evidence here to support—and Acme does not make—such an allegation.

REVERSED AND REMANDED for dismissal.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ACME REFRIGERATION
of BATON ROUGE, INC.,
Plaintiff-Appellee,

v.

WHIRLPOOL CORPORATION &
HEIL-QUAKER
CORPORATION,
Defendants-Appellants

NO. 85-4043
OPINION

Filed April 28, 1986

Before: John R. Brown, Thomas M. Reavley and Robert M. Hill, Circuit Judges.

PER CURIAM

Appeal from the United States District Court
for the Western District of Louisiana
John M. Shaw, District Judge, Presiding

OPINION

Per Curiam:

By our prior opinion we intended to make no holding to locate or measure the burden of proof on the issue of control by the parent corporation of its wholly owned subsidiary where a buyer urges that the parent and subsidiary are guilty of price discrimination. The evidence on that issue in this case denied that control, and neither pleading nor proof from the buyer implicated the existence of control.

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

U. S. DISTRICT COURT
Western District of Louisiana
FILED
JUL 26 1983

ACME REFRIGERATION OF
BATON ROUGE, INC.
VS. CIVIL ACTION NUMBER
821641

WHIRLPOOL CORPORATION and
HEIL-QUAKER CORPORATION SECTION S

RULING

The Robinson-Patman Act Violations

In *Security Tire & Rubber Co. v. Gates Rubber Co.*, 598 F.2d 962 (5th Cir. 1979), the Fifth Circuit stated that price discrimination under Section 2(a) of the Robinson-Patman Act requires that a plaintiff establish *two* separate and contemporaneous sales transactions made by the same seller to *two* distinct purchasers. No single sale can violate the act, one purchaser must pay more than another purchaser and there must be two or more transactions at different prices. The Court in *Security Tire* held that a transfer from a parent corporation to its wholly-owned subsidiary corporation can never be considered separate sales to a favored customer in a Robinson-Patman Act discrimination suit.

In this case Heil-Quaker, a subsidiary of Whirlpool, made the transfers to Whirlpool's Houston branch and to Solar. As in *Security Tire*, it may be sensible to treat Whirlpool, the parent corporation, its branch office, Houston, and its subsidiary corporation, Heil-Quaker, as a single economic unit under the Robinson-Patman Act claim. If this is so, Whirlpool was a single seller to two distinct purchasers, the plaintiff, Acme, and Solar, at different prices which favored Solar. To determine whether the parent actively controls a wholly-owned sales subsidiary where the subsidiary's sales are attributable to the parent herein, raises questions of fact. Therefore, the Motion for Summary Judgment on the Robinson-Patman Act claim is DENIED.

The Sherman Act Viloations

Plaintiff alleges that Whirlpool and Solar agreed to a horizontal territorial division of markets whereby Whirlpool would withdraw from Louisiana and no longer make sales to Acme.

It is clear from the facts that the manufacturer, Heil-Quaker, was the source of any decision to terminate Whirlpool as a Louisiana distributor, and therefore any possible conspiracy or agreement is a vertical one. The same would be true in the case of a conspiracy between a manufacturer and one of its distributors. Vertical restrictions on intrabrand competition will be found reasonable as a matter of law when the defendant-manufacturer has only a small market share. See *Red Diamond Supply, Inc. v. Liquid Carbonic Corporation*, 637 F.2d 1001 (1981) and cases cited therein. The record herein is clear that Heil-Quaker, even after Acme was replaced by Solar, had only a 3.9%

market share for central air conditioning products in Louisiana. It is clear that this was a decision by Heil-Quaker to increase interbrand competition and increase its market share. Since Heil-Quaker lacks market power it cannot affect the price of its product. Thus any vertical restraint could not be anticompetitive at the interbrand level as interbrand competition acts as a significant check on the exploration of intrabrand market power. However, the plaintiff's allegations of a conspiracy against Acme on the basis of price fixing raises another question. Vertical price restrictions are *per se* illegal. *Continental T.V.*, 413 U.S. at 51 n.18, 97 S.Ct. at 2558 n.18. *Red Diamond Supply, Inc.*, 637 F.2d at 1005. Heil-Quaker contends that it established its prices to its two buyers. Solar and Houston and each such buyer fixed or established independently of the other and of Hail-Quaker its respective resale price. The problem is that unless Houston resold to Acme at the same price it bought, Heil-Quaker, for all practical purposes, forced Acme to purchase at a discriminatory price in favor of Solar. Therefore, defendants' motion in regard to the Sherman Act price fixing claim is DENIED.

Since the Louisiana Antitrust Law essentially copies the federal statute the defendants' Motion for Summary Judgment on this claim is also DENIED. The Motion for Summary Judgment directed at plaintiffs' unjust enrichment claim will be GRANTED. As to the remaining state claims, defendants' motion will be DENIED.

Opelousas, Louisiana, July 27, 1983.

/s/

John M Shaw
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION
in Opelousas

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
F I L E D
Oct 4-1984

ACME REGRIGERATION OF
BATON ROUGE, INC.

CIVIL NO. 82-1641
DATE October 3, 1984

VS
WHIRLPOOL CORPORATION

MEMORANDUM OF PRE-TRIAL CONFERENCE

APPEARANCES: Wallace Hunter for the plaintiff; John L. Ropiequet, Michael Turoff, and Timothy J. McNamara for the defendants.

A pre-trial conference was held this date with all parties present. Trial is set for the week of October 9, 1984 Juries for all cases to be tried such week will be selected on October 9, 1984, beginning at 9:30 a.m.

A final list of "will call" witnesses shall be filed ten (10) days before trial; all "may call" witnesses will be deleted at that time. All exhibits which each party plans to offer at trial shall be marked and a list of said exhibits filed with the Clerk of Court in Opelousas five (5) working days before trial.

In jury cases, any special jury instructions shall be submitted five (5) working days before trial. In non-jury cases: a) each party shall submit a memorandum outlining the facts he expects to prove and legal authorities relied upon, which memorandum shall be filed five (5) working days prior to trial; b) one (1) full working day prior to trial, each party shall submit proposed findings of fact and conclusions of law.

The joint pre-trial stipulations filed pursuant to our standing pre-trial order is accepted by the Court and made part hereof, its porvisions to govern at the trial, subject, however, to the following modifications:

None. The pretrial stipulation was previously filed on March 22, 1984.

(1). Plaintiff's counsel moved and the court ordered that counts II and III be dismissed with prejudice.

(2). On motion of the defendants the court ruled that the tortious interference with contracts claim be dismissed as the Louisiana Supreme Court does not presently recognize the existence of such a claim. See *Eximco, Inc. v. Trane Co.*, No. 82-3591 (5th Cir. July 30, 1984). The court reserved ruling on the question of whether or not tortious interference with business relations exists. The Court will rule on Tuesday morning prior to commencement of trial.

(3) On the Defendants Motion in Limine Concerning Damages Issues, the court ruled as follows:
Issue I. Evidence of lost gross profits is admissible though it is not the measure of recovery. Thus, motion is Granted in part; Denied in part.
Issue 2. Damages claim arises only from acts subsequent to April 21, 1982. Thus, motion is Granted.

Issue 3. Damages will be determined by considering losses during the period from April 21, 1982 until December 31, 1982. Nevertheless, evidence of sales income during other time periods may be admissible. The court reserves ruling until appropriate point in the trial.

Issue 4. The motion was Granted.

(4) The plaintiff's motion in limine to exlude evidence of treble damages and attorneys fees was Granted.

(5) The plaintiff's motion in limine relative to the so-called single entity doctrine was Granted.

(6) It was also determined that the alternate will be discharged at the close of the trial proceedings.

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

U. S. DISTRICT COURT
Western Distsrict of Louisians
F I L E D
Nov - 8 1984

ACME REFRIGERATION OF
BATON ROUGE, INC.

CIVIL ACTION NUMBER

VS 82-1641

WHIRLPOOL CORPORATION and
HEIL-QUAKER CORPORATION SECTION O

Judgment Entered Nov. 9, 1984

WRITTEN REASONS AND ORDER AWARDING ATTORNEYS FEES, EXPENSES AND COSTS

Reasonable Attorneys Fees

The trilogy of *Copper Liquor, Inc. v. Adolph Coors Co.* opinions of the Fifth Circuit Court of Appeals governed our analysis and award of attorneys fees, expenses, and costs herein. 624 F.2d 275 (1980); 684 F.2d 1087 (1982); 701 F.2d 542 (en banc 1983). Focusing specifically upon the

four factors of the twelve Johnson[1] factors which Judge Wisdom suggested deserved "special heed": "(1) the time and labor involved, (5) the customary fee, (8) the amount involved and results obtained, and (9) the experience, reputation and ability of counsel", *Copper Liquor II,* 624 F.2d at 583, we find as follows:

1. Wallace A. Hunter of the law firm of Durrett, Hardin, Hunter, Dameron & Fritchie, counsel for the plaintiff spent a total of 867.75 hours through November 5, 1984 in handling this matter for plaintiff. Other members of the firm and associates spent a total of 23 hours assisting Wallace Hunter in this matter through November 5, 1984 in handling this matter for plaintiff. (Plaintiff's Exhibit-Post Trial Hearing No. 2, Affidavit of W.A. Hunter; Plaintiff's Exhibit Post Trial Hearing No. 3, time records through October 18, 1984, date of verdict; Plaintiff's Exhibit-Post Trial hearing No. 4, time records to date of hearing).

2. The services of Wallace A. Hunter may reasonably be valued at $125.00 per hour considering his customary fee of $100.00-$125.00 per hour, the quality of services rendered herein and his general experience, reputation and ability. See Proposed Findings of Fact and Conclusions of Law on attorneys fee issue submitted by Wallace Hunter. However, because the other partners and associates performed occasional, and indeed, very minimal work in this matter and because their qualifications are not evidenced in this record the Court values their services at a rate of $100.00 per hour.

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[1] *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 717-19 (5th Cir. 1974).

Utilizing the lodestar method of computation, i.e., by multiplying the number of hours reasonably expended by the hourly rate, we find an award of ONE HUNDRED TEN THOUSAND SEVEN HUNDRED SIXTY-EIGHT AND 75/100 ($110,768.75) DOLLARS a reasonaable amount of attorneys fees.

3. Additionally, the Court opts to exercise its discretion to adjust the lodestar to reflect the contingent nature of this suit, the preclusion of other employment by plaintiff's attorney due to this case, and the nature and length of the professional relationship with the client. The record reflects that the case was accepted by Wallace Hunter on a contingent fee basis and that the suit required an expenditure of long hours which could have been devoted to regular clients of Wallace Hunter, one of whom the plaintiff was not. The lodestar of $110,768.75 will be increased by one (1%) per cent, i.e., ONE THOUSAND ONE HUNDRED SEVEN AND 69/100 ($1,107.69) DOLLARS.

At the hearing on attorneys fees conducted before the Court on November 6, 1984, counsel for the defendants requested that the attorneys fees be discounted for time spent pursuing legal theories on which he was unsuccessful, specifically on Counts II and III of the complaint, the Sherman Act and Louisiana monopoly law claims, and also the Louisiana tortious inferences with business relations claim, all of which were dismissed by the Court on October 3, 1984 at the pre-trial conference. However, these claims were not clearly without merit at the time of the filing of suit, and further, the time spent in pursuing the rejected claims had a sufficient connexity with the successful claims to warrant compensation for the total time spent on this matter. Accordingly, there will be no discount on the award of attorneys fees.

With regard to costs and expenses, the Court accepts all costs and expenses submitted by Wallace Hunter through November 5, 1984 as reasonaable expenses incurred in connection with this litigation. Plaintiff's Exhibits Post Trial Hearing Nos. 2, 3 and 4. If any of these expenses are not taxable pursuant to 28 U.S.C. § 1910, then they are generally recoverable as attorneys fees. *Cooper Liquor III*, 684 F.2d at 1101. However, any of these costs and expenses which must be deemed attorneys fees will not be added to the lodestar for purposes of calculating the adjustment for the contingent and other Johnson factors.

Regarding the litigant's claim for reimbursement of expenses, the Court accepts the amounts claimed by Cleve Banquer in his affidavit as reasonable expenses, and the same will be awarded under the same analysis set forth above with one exception. The award in the amount of TWO THOUSAND SIX HUNDRED EIGHTY-FIVE AND NO/100 ($2,685.00) DOLLARS for services of Dr. G. Randolph Rice will be reduced to ONE THOUSAND SIX HUNDRED EIGHTY-FIVE AND NO/100 ($1,685.00) DOLLARS because a substantial portion of his original computations was devoted to determining losses for the year of 1983 and beyond, whereas the Court ruled on October 3, 1984 at the pre-trial conference that damages should be determined by considering losses during the period of time between April 21, 1982 and December 31, 1982. The award for costs and expenses including the claims of Wallace Hunter and the litigant total SEVEN THOUSAND SIXTY-SEVEN AND 40/100 ($7,067.40) DOLLARS.

Accordingly, it is ORDERED that an award of ONE HUNDRED ELEVEN THOUSAND EIGHT HUNDRED

SEVENTY—SIX AND 44/100 ($111,876.44) DOLLARS be imposed as attorneys fees, and that an award of SEVEN THOUSAND SIXTY—SEVEN AND 40/100 (7,067.40) DOLLARS be imposed as expenses and costs.

Opelousas, Louisiana, November 8, 1984.

/s/

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

U. S. DISTRICT COURT
Western Distsrict of Louisians
F I L E D
Nov - 8 1984

ACME REFRIGERATION OF
BATON ROUGE, INC.

CIVIL ACTION NUMBER
VS 82-1641

WHIRLPOOL CORPORATION and
HEIL-QUAKER CORPORATION SECTION O

JUDGMENT

This matter came on for trial, and a jury verdict having been duly rendered:

Therefore, the Court having had an evidentiary hearing on November 5, 1984 relative to the amount and value of inventory in keeping with the stipulation of the parties and the jury's answer to the interrogatory on this item of damages:

The Court further having had an evidentiary hearing on the plaintiff's claim for attorney fees, expenses and costs, and the Court having rendered an opinion fixing such amounts:

Judgment Entered NOV. 9, 1984

It is ORDERED AND ADJUDGED, as to Count I of the complaint, the Robinson-Patman Price Discrimination Act, the Court trebling the items of damages awarded, that judgment be entered in favor of plaintiff, Acme Refrigeration of Baton Rouge, Inc. and against defendants, Whirlpool Corporation and Heil-Quaker Corporation, in the sum of SEVEN HUNDRED FIFTY-SEVEN THOUSAND EIGHT HUNDRED THIRTY-SEVEN AND 26/100 ($757,837.26) DOLLARS together with an award of attorney fees in the amount of ONE HUNDRED ELEVEN THOUSAND EIGHT HUNDRED SEVENTY-SIX AND 44/100 ($111,876.44) DOLLARS and expenses and costs in the amount of SEVEN THOUSAND SIXTY-SEVEN AND 40/100 ($7,067.40) DOLLARS, together with interest as provided by 28 U.S.C. § 1961 from date of entry of judgment.

As to the alternative counts of the complaint, in the event the judgment rendered in the preceding paragraph is not made executory, judgment is hereby entered in favor of plaintiff, Acme Refrigeration of Baton Rouge, Inc., and against defendant, Whirlpool Corporation, in the sum of TWO HUNDRED FIFTY-TWO THOUSAND SIX HUNDRED TWELVE AND 42/100 ($252,612.42) DOLLARS together with legal interest at the rate of twelve (12%) per cent per annum from the date of judicial demand until the date of entry of judgment, and thereafter interest as provided by 28 U.S.C. § 1961, together with all costs of court.

Opelousas, Louisiana, November 8, 1984.

/s/ John M. Shaw

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

NO. 86-20

Supreme Court, U.S.
FILED
AUG 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ACME REFRIGERATION OF BATON ROUGE, INC.
Petitioner,

v.

WHIRLPOOL CORPORATION and HEIL-QUAKER CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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Question Presented

Whether a corporation, seeking to realize efficiency through decentralized management, may delegate pricing autonomy to a subsidiary corporation only at its peril of being held in violation of the Robinson-Patman Act if the autonomous subsidiary thereafter sells at different prices than the parent itself.

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NO. 86-20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ACME REFRIGERATION OF BATON ROUGE, INC.
Petitioner,

v.

WHIRLPOOL CORPORATION and HEIL-QUAKER CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner's statement of the case omits *all* of the facts concerning the activities of respondents, Whirlpool Corporation ("Whirlpool") and its wholly-owned manufacturing subsid-

iary, Heil-Quaker Corporation ("Heil-Quaker").[1] Whirlpool manufactures major household appliances such as washing machines and refrigerators, known in the trade as "white goods," which it distributes to dealers, dealer-installers and contractors through thirteen of its own unincorporated sales divisions and through independent distributors. It does not manufacture any central heating and air conditioning equipment.

Heil-Quaker manufactures "Whirlpool" brand central heating and air conditioning equipment at its plants in Tennessee. It sells and distributes its products through a nationwide network of fifty-four distributors, or wholesalers, which resell to dealer-installers and contractors. Fifty-one of Heil-Quaker's wholesale distributors are independent third parties. Three of Whirlpool's unincorporated sales divisions also function in their respective trading areas as distributors of central heating and air conditioning equipment manufactured by Heil-Quaker.

---

[1] The facts set forth herein are stated in the Court of Appeals' opinion (Appendix A to petitioner's brief), and in the affidavits in support of respondents' motion for summary judgment reproduced in part in the Appendix to this brief.

Whirlpool has no parent corporation. Whirlpool has the following non-wholly-owned subsidiaries and affiliates:

KitchenAid Limited
Aspera S.r.l.
Industria de Refrigeracao Consul S.A.
Empresa Brasileira de Compressores S.A.
Brastemp S.A. Aparelhos Domesticos E Comerciais
Brasmotor S.A.
Brastemp S.A.
Corporation for Innovation Development
Federal's Inc.
Pantry Pride, Inc.
Inglis Limited

Heil-Quaker has no non-wholly-owned subsidiaries or affiliates.

One of the Whirlpool sales divisions which acted as a Heil-Quaker distributor was the Houston Sales Division ("Whirlpool-Houston"). As a Heil-Quaker distributor, Whirlpool-Houston purchased central heating and air conditioning equipment which Heil-Quaker manufactured in Tennessee, actually took delivery at its Houston business facility, warehoused the equipment, and ultimately resold and delivered it to dealer-installers and contractors in the Houston area. Whirlpool-Houston also resold and delivered the Heil-Quaker equipment to companies operating as sub-distributors in other Texas cities and to petitioner, which operated as a sub-distributor in a thirteen-parish trading area in southwest Louisiana. Petitioner resold the equipment to dealer-installers and contractors in that area. Heil-Quaker equipment was sold in the remainder of Louisiana by two independent distributors, in New Orleans and Shreveport, which purchased and took delivery directly from Heil-Quaker in Tennessee.

In 1981, Heil-Quaker became dissatisfied with Whirlpool-Houston's performance in the large and critically important Houston metropolitan market which accounted for 11% of the national market for central air conditioning. Accordingly, it requested Whirlpool-Houston to stop selling to sub-distributors outside Houston so it could concentrate its efforts on building up sales in the Houston market. At the same time, Heil-Quaker was also dissatisfied with the sales efforts of its independent distributor in New Orleans, and its independent distributor in Shreveport was having financial difficulties. Therefore, Heil-Quaker decided to appoint a single new direct distributor which would service all of Louisiana, thereby eliminating the need for the two independent direct distributors in Shreveport and New Orleans and for petitioner as a sub-distributor of Whirlpool-Houston. Heil-Quaker appointed Solar Supply Company ("Solar") as its new direct distributor for all of Louisiana in April, 1982. However, Whirlpool-Houston did not terminate petitioner as a sub-distributor in Louisiana and petitioner

continued to buy from Whirlpool-Houston for two months after Solar was appointed.

Heil-Quaker sold to Whirlpool-Houston and all of its other fifty-three direct distributors on a national zone pricing basis. Houston and Louisiana were in the same zone and Heil-Quaker at all times sold at identical prices to its distributors in that zone. Before Heil-Quaker terminated its independent direct distributors in Shreveport and New Orleans, it sold to them and to Whirlpool-Houston at the same prices and on the same terms and conditions. After Heil-Quaker appointed Solar as its direct distributor for all of Louisiana, it sold to Solar and to Whirlpool-Houston at the same prices and on the same terms and conditions.

Whirlpool-Houston, acting as a wholesaler, received goods from Heil-Quaker and performed a warehousing and transshipment function for its sub-distributors, including petitioner. Obviously, petitioner paid Whirlpool-Houston a higher price for Heil-Quaker equipment than the direct buying distributors in the zone, including Solar, which purchased and received shipments directly from Heil-Quaker in Tennessee.

Petitioner's price discrimination claim was based upon the fact that from May, 1982 until it stopped buying from Whirlpool-Houston in July, 1982, a period of two months, it paid Whirlpool-Houston higher prices for Heil Quaker equipment than its direct-buying competitor, Solar, paid to the manufacturer, Heil-Quaker. Petitioner alleged that Heil-Quaker, as a wholly-owned subsidiary of Whirlpool, was Whirlpool's alter ego, and that Heil-Quaker's sales to its direct buying customers were therefore sales by Whirlpool. Thus, petitioner claimed that Whirlpool and Heil-Quaker were guilty of price discrimination in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), because of the sales by Whirlpool-Houston to

petitioner at higher prices than those charged by its subsidiary, Heil-Quaker, to its factory direct purchaser, Solar.

Prior to trial, respondents moved for summary judgment. Respondents' affidavits, unchallenged by petitioner, established that Heil-Quaker was not the alter ego of Whirlpool, but rather that it acted independently at all times. Those affidavits showed that Heil-Quaker's distributors, including the Whirlpool sales divisions, operated on one-year contracts that were entered into, renewed or terminated solely by Heil-Quaker, without direction from Whirlpool, and that in the past Heil-Quaker had declined to renew contracts with other Whirlpool sales divisions because of their poor performance. The affidavits further showed that Heil-Quaker set its own prices, terms and conditions of sale with no participation by Whirlpool and that Whirlpool-Houston likewise set its own prices, terms and conditions of sale with no participation by Heil-Quaker. The trial court nevertheless held that there was a question of fact on the issue of whether there was control by the parent, Whirlpool, of its subsidiary, Heil-Quaker, and it denied summary judgment.

The Fifth Circuit, reversing after a trial and judgment for petitioner, held that the trial court should have granted summary judgment in favor of respondents because there was no issue of fact as to control. The court found that respondents had established, as a matter of law, that Whirlpool did not actively control Heil-Quaker or the terms of its sales, so that Heil-Quaker and Whirlpool-Houston were not the same seller. Hence, there was no price discrimination on Heil-Quaker's sales to Solar, as a direct-buying distributor, and Whirlpool-Houston's sales to petitioner, as a sub-distributor. *Acme Refrigeration of Baton Rouge, Inc. v. Whirlpool Corp.*, 785 F.2d 1240, 1243-44 (5th Cir.), *reh. denied,* 785 F.2d 1245 (5th Cir.), *pet. for cert. filed,* No. 86-20 (July 10, 1986).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

SUMMARY OF ARGUMENT

Respondents oppose the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case. The decision below does not conflict with prior decisions of the Fifth Circuit or of other Circuits. It fully comports with this Court's admonition against too facile application of *per se* rules. It avoids an application of the Robinson-Patman Act which would effectively outlaw decentralized management of sales and marketing, thereby depriving consumers of the benefits of the efficiencies which flow from decentralization, and promoting the very price rigidity which is antithetical to the real policies of the antitrust laws.

ARGUMENT

The gist of the Petition is the complaint that the lower federal courts have not applied a universal *per se* rule in *all* Robinson-Patman cases mandating disregard of the separate existence of a corporation and its autonomous subsidiary corporation without regard to the facts of the case. Petitioner asks this Court to formulate such a universal *per se* rule in the interest of "uniformity."

Respondents suggest that the lower courts' failure to develop a *per se* rule of universal applicability does not call for intervention by this Court. Such failure reflects the fact that a universally applicable *per se* rule would be inappropriate. Indeed, this Court has cautioned against too facile application of *per se* rules, *e.g., Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50, nn.15,16 (1977); *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 8-9 (1979).

Moreover, the decision of the Court of Appeals in this case does not, contrary to Petitioner's claims, conflict with its own prior decision in *Security Tire & Rubber Co. v. Gates Rubber Co.*, 598 F.2d 962 (5th Cir.), *cert. denied*, 444 U.S. 942 (1979), nor with the Sixth Circuit's decision in *Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214 (6th Cir. 1985). Those decisions both rejected claims that a corporate seller had discriminated in price *by selling to its own subsidiary* at a lower price than the parent charged to a plaintiff which competed with the allegedly "favored" subsidiary. As stated by the Fifth Circuit in *Security Tire*, 598 F.2d at 965:

> We hold that transfers from a parent corporation to its wholly-owned subsidiary corporation *can never be considered* separate *sales to a favored customer* in a Robinson-Patman Act discrimination suit. (emphasis supplied)

The court reasoned (598 F.2d at 966) that a sale by a parent to its own wholly-owned subsidiary is the economic equivalent of an intra-company transfer of goods and, as such, cannot be considered a "sale" for Robinson-Patman purposes.

Russ' Kwik followed *Security Tire*, adopting what the Sixth Circuit described as "the per se rule of *Security Tire*" (772 F.2d at 220). Noting this Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), the Sixth Circuit observed that a parent and its subsidiary are a single economic unit and held that the Robinson-Patman Act is not concerned with transfers between them. It therefore affirmed a summary judgment which had dismissed a claim of price discrimination against Marathon Petroleum Co. which had allegedly "sold" to its own subsidiary at lower prices than it charged the plaintiff which competed with the subsidiary.

The instant case does not present the same issue which concerned the Fifth and Sixth Circuits in *Security Tire* and *Russ' Kwik*. This case simply does not concern the "price" at which goods are transferred between a parent and its subsid-

iary. Unlike *Security Tire* and *Russ' Kwik,* there is no claim here that Heil-Quaker extended prices to Whirlpool which were discriminatory or otherwise unlawful, and the holdings of *Security Tire* and *Russ' Kwik* are therefore inapposite.

Unlike those cases, the claim here is that both defendants violated the Robinson-Patman Act because Heil-Quaker sold to a third party, Solar, at lower prices than those at which Whirlpool-Houston sold to petitioner Acme. This claim rests on the assertion that Heil-Quaker's undisputed separate legal existence must be disregarded and that its complete management autonomy, which the Court of Appeals held had been established by uncontroverted evidence, must be ignored, in order to hold that the two corporations are the "same" seller and therefore violated the Robinson-Patman Act by selling at different prices. The basis on which Whirlpool-Houston obtained products from Heil-Quaker, and whether those transactions are "sales," are irrelevant to the issue in this case—whether the two separate corporations, separately managed but commonly owned, are the same seller.

In *Copperweld, supra,* this court held that a parent and its subsidiary are incapable of conspiring with each other for purposes of § 1 of the Sherman Act reasoning, *inter alia,* that a parent and its subsidiary, by "agreeing" upon a common course of action, do not thereby join economic resources which had previously served separate interests. The Court explored the policies behind the basic Sherman Act dichotomy between unilateral and concerted action and observed that consumers are often thought to benefit from efficiencies created by decentralized management, cautioning against woodenly discouraging corporations from delegating responsibility to autonomous units.

The Court of Appeals decision in this case comports fully with that admonition in *Copperweld.* Indeed, decentralized management of sales and marketing could hardly be con-

templated, let alone exist, if petitioner's position were adopted and commonly owned but autonomous corporations could charge different prices only at the peril of Robinson-Patman treble damage suits. Any fears about Robinson-Patman abuse by corporations setting up sham subsidiaries can be adequately policed by well established antitrust doctrines such as the "indirect purchaser" doctrine, a concept implicit in the Fifth Circuit's decision and its per curiam opinion denying Acme's petition for rehearing. See Appendix A and B to the Petition. See also, *American News Co. v. FTC,* 300 F.2d 104, 109-10 (2d Cir. 1962), *cert. denied,* 371 U.S. 824 (1962); *Purolator Products, Inc. v. FTC,* 352 F.2d 874, 883 (7th Cir. 1965), *cert. denied,* 389 U.S. 1045 (1968); *Hiram Walker, Inc. v. A & S Tropical, Inc.,* 407 F.2d 4, 8 (5th Cir. 1969), *cert. denied,* 396 U.S. 901 (1969); *Barnosky Oils, Inc. v. Union Oil Co.,* 665 F.2d 74, 83-84 (6th Cir. 1981). Clearly, the "indirect purchaser" doctrine seems to have been the thrust of Petitioner's "alter ego" claim which failed for lack of any evidence to support it.

Rather than conflicting with this Court's precedents, the Court of Appeals' decision in this case effectuated the long-standing admonition that overly simplified Robinson-Patman enforcement is to be avoided, lest it give rise to price uniformity and rigidity in conflict with the purpose of other antitrust legislation. *Automatic Canteen Co. v. Federal Trade Commission,* 346 U.S. 61, 63 (1953); *Great Atlantic & Pacific Tea Company, Inc. v. Federal Trade Commission,* 440 U.S. 69, 80 and n. 13, (1979).

Nor does the decision below have apparent significance extending beyond the interests of the immediate parties to this suit. The major policy debate regarding the application of Robinson-Patman to intra-enterprise transfers has been, as in *Security Tire* and *Russ' Kwik,* whether the price of an intra firm transfer between parent and subsidiary can be compared to a price or sale to an independent purchaser which competes with the subsidiary. See, A.B.A. Section of Antitrust Law, Mono-

graph 4, "The Robinson-Patman Act: Policy and Law," Vol. 1 at 48-50. That is not the issue here.

In this case the Court of Appeals held that sales to unrelated third parties by a parent and its wholly-owned subsidiary corporation are not made by the "same" seller for Robinson-Patman purposes where the subsidiary enjoys pricing autonomy under a scheme of decentralized management. This holding avoids needlessly outlawing decentralized management and depriving consumers of its benefits, avoids a construction or application of the Robinson-Patman Act which would promote price uniformity and rigidity in conflict with the purpose of other antitrust legislation, does not involve an issue which has recurred frequently in recent litigation, and does not conflict with prior decisions of this Court or of other Circuits. The case only involves alleged price discrimination in thirteen parishes of Louisiana which lasted for two months.

CONCLUSION

Review of the Court of Appeals' decision is not required, and the Petition should be denied.

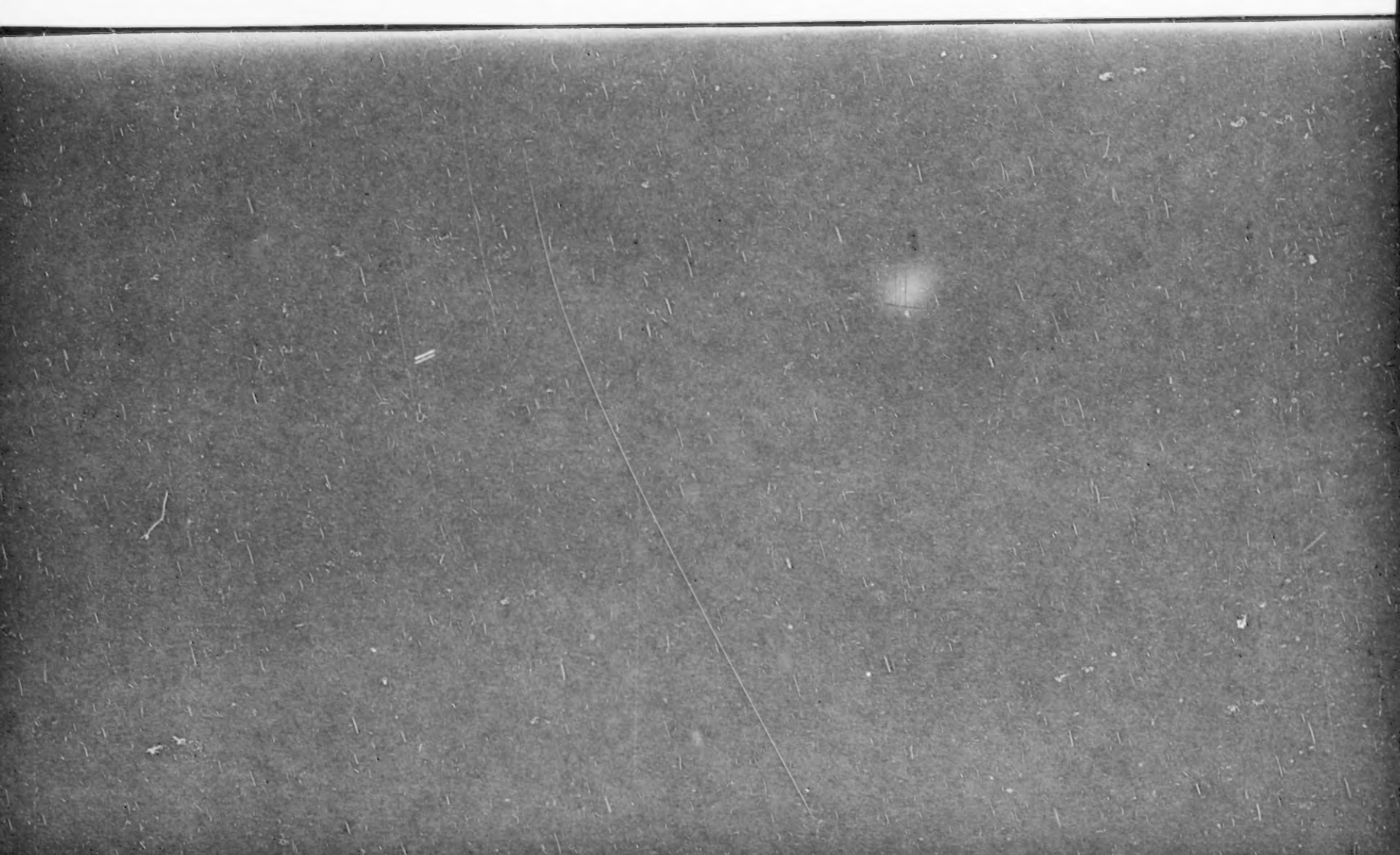
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APPENDIX



AFFIDAVIT OF CHARLES L. SHATTUCK

Charles L. Shattuck, being first duly sworn on oath, deposes and says:

1. Affiant has been employed by Heil-Quaker Corporation since 1969, has been Vice President—Marketing of this corporation since 1979 and has personal knowledge of the matters stated in this affidavit. As Vice President—Marketing, affiant reports to Charles H. Findley, President and Chief Executive Officer of Heil-Quaker. Mr. Findley is neither an officer nor a director of Whirlpool Corporation. No officer reporting to Mr. Findley nor any other employee of Heil-Quaker is compensated by Whirlpool.

2. Heil-Quaker is a Delaware corporation and is a wholly-owned subsidiary of Whirlpool Corporation, a Delaware corporation. Heil-Quaker is in the business of manufacturing central heating and cooling equipment for sale under various brand names including the "Whirlpool" brand. Heil-Quaker manufactures this equipment at two plants located at LaVergne and Lewisburg, Tennessee. It owns both plants. Whirlpool Corporation is in the business of manufacturing major household appliances (white goods) and does not manufacture central heating and cooling equipment. Heil-Quaker does not manufacture white goods.

3. Heil-Quaker sells Whirlpool brand central heating and cooling equipment through a distribution system currently consisting of fifty-four (54) distributors. These fifty-four distributors cover most areas of the United States. Heil-Quaker, as a manufacturer, sells the Whirlpool brand only to these fifty-four distributors and does not sell the Whirlpool brand in competition with any of them.

4. Fifty-one (51) of Heil-Quaker's distributors of Whirlpool brand central heating and cooling equipment

are independent entities which have no corporate or ownership relationship with Heil-Quaker, Whirlpool or any parent or subsidiary corporation of either of them. Three of Heil-Quaker's distributors of Whirlpool brand central heating and cooling equipment are Sales Divisions of Whirlpool Corporation. These Sales Divisions are located in Houston, Texas, Charlotte, North Carolina, and Kansas City, Missouri. These Sales Divisions also resell Whirlpool brand major household appliances (white goods) which are manufactured by Whirlpool Corporation. Whirlpool Corporation has ten other Sales Divisions located throughout the country, none of which distributes Whirlpool brand central heating and cooling equipment. In all of these areas, Heil-Quaker sells Whirlpool brand central heating and cooling equipment to independent distributors.

5. All of Heil-Quaker's distributors of Whirlpool brand central heating and cooling equipment are appointed for terms not exceeding one year under a standard form of contract negotiated on behalf of Heil-Quaker by its Zone Sales Managers James Hobbs (Southern Zone) and Kenneth Shinnick (Northern Zone) and executed by its President. These contracts are approved by Messrs. Hobbs' and Shinnick's immediate superior, Heil-Quaker's National Sales Manager, Arthur Mehuron, and by affiant, Mr. Mehuron's immediate superior. Messrs. Hobbs, Shinnick, Mehuron and affiant also have sole authority to renew, non-renew or terminate existing distributors of Whirlpool brand central heating and cooling equipment. These contracts do not limit or restrict the territory in which the distributors may resell Whirlpool brand.

6. Whirlpool Corporation is never consulted and does not participate in the decisions made to appoint, renew, non-renew or terminate Heil-Quaker's distributors of Whirlpool brand central heating and cooling equipment.

Heil-Quaker management has been instructed by Herbert K. Anspach, Chairman of the Board of Heil-Quaker, and also President of Whirlpool, that Heil-Quaker has total autonomy and authority to make such decisions and that such decisions are to be made solely on the basis of Heil-Quaker management's evaluation of marketing considerations which maximize the overall profitability of Heil-Quaker in the judgment of Heil-Quaker's management.

7. Heil-Quaker has appointed local Whirlpool Sales Divisions as distributors of Whirlpool brand central heating and cooling equipment only in circumstances where, in the judgment of Heil-Quaker management, those sales divisions presented the best available means for distributing such equipment. In particular, Heil-Quaker did not renew its distributorship agreement with Whirlpool's Northern California Sales Division effective as of July 1980 when Heil-Quaker management determined that the Northern California Sales Division was not doing an adequate job of distributing said equipment. An independent corporation, Pameco Aire, was appointed in its place and continues as the distributor of said equipment for Northern California. In 1982, Heil-Quaker had under consideration the appointment of Whirlpool's Dallas Sales Division as a distributor of Whirlpool central brand heating and cooling equipment in the Dallas Metropolitan Area, but instead appointed an independent corporation, Climate Supply Co., as its distributor for the year 1983 because, in the judgment of Heil-Quaker management, Climate Supply Co. would do a more satisfactory job of distribution. During 1981, Heil-Quaker management considered not renewing the Houston Sales Division because of its unsatisfactory market penetration in the Houston metropolitan area, its area of primary responsibility, but decided instead to encourage it to concentrate its efforts on the Houston market. In prior years, Heil-Quaker has not

renewed distributorship agreements with Whirlpool Sales Divisions in Miami, Chicago, Dallas, and Detroit.

8. Heil-Quaker's prices, terms and conditions of sale to its distributors for Whirlpool brand central heating and cooling equipment are determined and established solely by Heil-Quaker personnel. Heil-Quaker's distributor prices are initially determined by its National Merchandise Manager, Frank Hartman, with the approval of its Vice President—Finance, Richard G. Marquardt. Mr. Hartman determines Heil-Quaker's total costs of manufacture and other distribution and sales costs per product, and adds to these costs a desired gross profit margin for each product. These distributor prices (total of all costs plus a gross profit margin) are then furnished to affiant, and Heil-Quaker's National Sales Manager and Zone Sales Managers. Each Zone Sales Manager determines the appropriate prices for geographic zones within his area of responsibility, taking into consideration the particular competitive conditions within each zone. For example, in Zone 15 (the State of Texas and Western Louisiana), Zone Sales Manager James Hobbs determines a uniform discount from the distributor price with the approval of affiant and Mr. Mehuron for all products within Zone 15. These uniformly discounted prices are the sales prices for all distributors within Zone 15. Thus, the Houston Sales Division is within Zone 15 and it pays the same price for Whirlpool brand central heating and cooling equipment as Heil-Quaker's other distributors which are located within this zone. The Houston Sales Division and Solar Supply Company, both within Zone 15, paid Heil-Quaker the same prices in 1982 for the same products they purchased from it. . . . .

9. Whirlpool Corporation is never consulted and does not participate in any way in any part of the process of Heil-Quaker's decision-making when it sets its prices,

terms and conditions of sale to its distributors of Whirlpool brand central heating and cooling equipment. Heil-Quaker management has been instructed by Mr. Anspach that Heil-Quaker has total autonomy and authority for establishing such prices and its decisions are to be made strictly on the basis of Heil-Quaker management's evaluation of marketing conditions which will maximize the overall profitability of Heil-Quaker in the judgment of its management. Affiant receives no compensation or employee benefits whatsoever from Whirlpool. His compensation from Heil-Quaker is based in part on the improvement or increase in sales and market penetration which are achieved by Heil-Quaker for the products it manufactures.

10. Heil-Quaker has no knowledge of the prices charged by its distributors to their customers of Whirlpool brand central heating and cooling equipment and retains no control over its distributors' resale prices.

Further affiant saith not.

AFFIDAVIT OF JAMES HOBBS

James Hobbs, being first duly sworn on oath, deposes and says:

1. Affiant is and has been since 1981 Southern Zone Sales Manager for Heil-Quaker Corporation. He has been employed by Heil-Quaker in that and other capacities since August, 1976, and has personal knowledge of the matters stated in this affidavit.

2. As Zone Sales Manager, affiant has the responsibility for appointing distributors for Whirlpool brand central heating and cooling equipment with the approval of his superiors, Arthur Mehuron, Heil-Quaker's National Sales Manager, and Charles L. Shattuck, Heil-Quaker's Vice President—Marketing. Affiant also has the responsibility for deciding whether to renew, non-renew or terminate existing distributors of this equipment.

3. Whirlpool Corporation has never been consulted nor has it participated in affiant's decisions to appoint, renew, non-renew or terminate distributors of Whirlpool brand central heating and cooling equipment.

4. Through the end of 1981, Heil-Quaker did not have any distributors for Whirlpool brand central heating and cooling equipment in the 13-parish area of southwestern Louisiana described in the complaint. The Houston Sales Division of Whirlpool Corporation, a distributor for Heil-Quaker, sold the Whirlpool brand to plaintiff, which was located in the 13-parish area. Plaintiff never had any sales agreement with Heil-Quaker for the purchase of the Whirlpool brand. Heil-Quaker's distributor for southeastern Louisiana was Mischer Wholesale, located in New Orleans, and its distributor for northern Louisiana was United Distributing of Shreveport, Louisiana. . . . .

5. In late 1981, Heil-Quaker management, including affiant, concluded that Heil-Quaker's market penetration for the Whirlpool brand was inadequate in the State of Louisiana and in the Houston Metropolitan Area. Heil-Quaker management, including affiant, desired to increase its market share for the Whirlpool brand substantially in the State of Louisiana by appointing at the earliest opportunity a single distributor which would distribute the Whirlpool brand in the entire state. Heil-Quaker management also desired the Houston Sales Division to concentrate its efforts in the Houston Metropolitan Area, a market which accounts for 11% of the air conditioning equipment sold in the United States and in which the Whirlpool brand had unsatisfactory market penetration.

6. To implement this decision, affiant decided not to renew Heil-Quaker's distributorship agreements with Mischer Wholesale and United Distributing of Shreveport effective as of April 30, 1982. Affiant also decided not to appoint plaintiff as Heil-Quaker's sole distributor of the Whirlpool brand for the State of Louisiana because plaintiff did not have existing distribution facilities in the northern part of the state and plaintiff indicated to affiant that it would not discontinue distributing the heating and cooling equipment line of a Heil-Quaker competitor if it were appointed a distributor for the Whirlpool brand. For these reasons, affiant initiated discussions in February 1982 with Solar Supply Company, located in New Orleans and with branch outlets located in Lake Charles, Baton Rouge, Monroe, Lafayette, Shreveport and Alexandria, Louisiana, and decided in April 1982 to appoint Solar as its sole distributor for the state because, in his judgment, Solar presented the maximum opportunity for increased market penetration for the Whirlpool brand in the state.

7. To implement this decision further, affiant suggested to Whirlpool's Houston Sales Division in December

1981 that sales to Houston customers in the 13-parish area and other outlying areas, including plaintiff, should be phased out by the middle of 1982. . . .

8. To implement this decision further, Heil-Quaker entered into a distributorship agreement with Solar effective as of April 21, 1982, . . . assigning Solar as Heil-Quaker's distributor for the entire State of Louisiana. At the time Heil-Quaker appointed Solar as its distributor, Heil-Quaker did not know the terms or provisions, if any, of the sales arrangements between the Houston Sales Division and plaintiff, it expected that plaintiff would be phased out by the Houston Sales Division by the end of June, 1982 as agreed, and it did not know that the Houston Sales Division had not advised plaintiff of the phase-out. . . . .

* * *

11. Neither Whirlpool Corporation nor any of its officers, directors or employees was consulted nor did they participate in the decision to change Heil-Quaker's distribution of Whirlpool brand central heating and cooling equipment in the States of Louisiana and Texas. The decision was made solely by affiant with the advice, recommendations and concurrence of Messrs. Shadduck, Mehuron, and Richard Rush, Heil-Quaker's Regional Sales Manager with responsibility for Zone 15 (the States of Texas and Western Louisiana).

12. As Zone Sales Manager, affiant has responsibility for determining the actual prices which will be charged to its distributors of Whirlpool brand central heating and cooling equipment, based upon the distributor prices supplied by Heil-Quaker's National Merchandise Manager, Frank Hartman, and taking into account competitive conditions in geographic zones within affiant's area. At all

times in 1981 and 1982, Heil-Quaker charged the same prices for Whirlpool brand central heating and cooling equipment supplied to all of its distributors in Zone 15. At all times in 1981 and 1982, Heil-Quaker charged the same price for the same merchandise it sold to Solar and to Whirlpool's Houston Sales Division. The sole exception to this uniform pricing was that lower prices were granted to individual distributors, including Solar, from time to time to meet the equally low prices of a competitor of Heil-Quaker. There has never been any discussion between Heil-Quaker and Solar concerning the prices at which the Houston Sales Division resold the Whirlpool brand to plaintiff.

13. Whirlpool Corporation has never been consulted and does not participate in any way in Heil-Quaker's decisions concerning prices, terms or conditions of sale for the Whirlpool brand to its distributors. Affiant has from time to time received requests for lower prices on certain products than its regular prices from distributors, including Whirlpool's Houston Sales Division and Solar, which affiant has refused to grant.

14. Heil-Quaker has no knowledge of or control over prices charged by its distributors to their customers, including associate distributors, and including prices charged by Whirlpool's Houston Sales Division and Solar to their customers.

* * *

Further affiant saith not.

AFFIDAVIT OF CHARLES G. PITNER

Charles G. Pitner, being first duly sworn on oath, deposes and says:

1. Affiant is and has been employed by the Houston Sales Division of Whirlpool Corporation since October 1961, has been its General Manager since September 1963 and has personal knowledge of the matters stated in this affidavit.

2. The Houston Sales Division is an operating division of Whirlpool Corporation and is not a separately incorporated entity.

3. The Houston Sales Division is engaged in the distribution of Whirlpool brand major household appliances (white goods) manufactured by Whirlpool and has also been appointed as distributor for the Houston, Texas area of Whirlpool brand central heating and cooling equipment manufactured by Heil-Quaker Corporation, a wholly-owned subsidiary of Whirlpool. The sale of Whirlpool brand central heating and cooling equipment by the Houston Sales Division accounted for approximately 6% of its total sales for all lines in 1981 and approximately 4% in 1982.

4. Prior to December 31, 1981, the Houston Sales Division sold Whirlpool brand central heating and cooling equipment to plaintiff, located in the 13-parish area of southwestern Louisiana described in the complaint, and to areas of Texas located outside the Houston Metropolitan Area. The Houston Sales Division decided to distribute Whirlpool brand central heating and cooling equipment in the 13-parish area and in the outlying areas of Texas by appointing sub-distributors, also known as associate distributors. Cooling and Heating, Inc. of Lake Charles was designated as distributor for 11 of the 13 parishes in 1973 and for two additional parishes in 1974. In December,

1980, plaintiff purchased the three branches of Cooling and Heating, Inc. located in Lake Charles, Lafayette, and New Iberia, Louisiana and became the Houston Sales Division's associate distributor for the 13-parish area for 1981. . . . Each sales agreement with both plaintiff and Cooling and Heating was for a term of one year and none of the agreements restricted the areas in which they were permitted to resell the Whirlpool brand. The Houston Sales Division also had four other associate distributors in 1981 covering San Antonio, Austin, Corpus Christi, Temple and Freeport, Texas.

* * *

7. The Houston Sales Division is operated as a separate profit center of Whirlpool Corporation and is expected to make a profit on its own operations. The Houston Sales Division accordingly takes into consideration its own operating costs and the prices it pays Heil-Quaker when it determines its resale prices to its customers, including associate distributors, for Whirlpool brand central heating and cooling equipment. Heil-Quaker is never consulted and does not participate in the Houston Sales Division's determination of its prices, terms and conditions of sale to its customers, including associate distributors such as plaintiff.

* * *

Further affiant saith not.